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No. 01-706

IN THE
Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR
OF THE ESTATE OF JEANNE SPRIETSMA,
Petitioner,

v.

MERCURY MARINE, A DIVISION
OF BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the

It represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every industrial sector and geographic region of the country. The Chamber has participated as amicus curiae in several hundred cases before this Court, including numerous cases addressing the subject of federal preemption. *See, e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995).

SUMMARY OF ARGUMENT

Petitioner's tort claim is preempted. To begin with, his claim arises in the uniquely federal field of maritime law. When Congress legislates in the maritime field, it customarily imposes uniform rules of conduct, safety standards, and design requirements on boats and maritime activities subject to federal jurisdiction. The Federal Boat Safety Act is no exception; Congress confirmed throughout the Act its intent that recreational boats be subject to uniform design and safety standards. Tort claims like petitioner's, however, would result in state-court juries articulating a welter of different safety and design standards, undermining both Congress's general intent consistently to regulate maritime activities and its specific intent in the Boat Safety Act to regulate recreational boat safety and design under uniform federal standards.

In the Boat Safety Act itself, moreover, Congress expressly balanced the goal of the statute—increasing boat safety through uniform standards—against the countervailing need for restraint before imposing onerous design changes on boat and equipment manufacturers. The Act specifically prohibits the Coast Guard from requiring manufacturers to substantially alter their existing stock and prohibits the agency from

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consent of the parties, and copies of the consent letters have been filed with the Clerk.

requiring even *insubstantial* alterations unless the benefits from those alterations far outweigh their attendant costs. State tort actions against manufacturers have no such limitations. Once a jury sets a safety standard, manufacturers must design to that standard or face the consequences. Similarly, with respect to prospective alterations, the Boat Safety Act grants manufacturers a generous grace period to bring their production in line with new federal requirements. State tort judgments make no such dispensation. Petitioner's tort suit thus conflicts not only with the purpose and intent of the Boat Safety Act, but with the Act's express terms.

Petitioner's tort claim, which depends on the allegation that propeller guards are required on outboard motors like Mercury Marine's, also conflicts with the Coast Guard's considered decision *not* to require propeller guards. The Coast Guard reached its conclusion after consulting with its expert advisory committee—as the Boat Safety Act requires—and after considering the Committee's submission regarding the prohibitive costs and dubious benefits of propeller guards. The Coast Guard's decision should be accorded preemptive effect. The agency was not required to give notice and seek comment before conflicting state law would be preempted; its considered decision, made after a year's worth of public inquiry and on the unanimous recommendation of its expert advisory panel, is quite sufficient—particularly in this federal field—to preempt conflicting state requirements.

Finally, petitioner's concerns about federalism and state sovereignty are overwrought. When Congress legislates in the maritime field, the federal interest in preserving uniformity controls, and neither States nor their juries have a role in developing or implementing their own several standards of maritime law.

ARGUMENT

PETITIONER'S ACTION IS PREEMPTED BY FEDERAL MARITIME LAW AND THE BOAT SAFETY ACT.

We agree with the Illinois Supreme Court that this is an admiralty case, Pet. App. 6, and we likewise agree with petitioner's amicus ATLA that federal maritime law controls the outcome of this case. *See* ATLA Br. 21. The question whether state law is preempted therefore need not be decided; rather, this Court can simply hold that federal maritime law provides the applicable rule of decision and does not impose a duty to install propeller guards. The expert agency charged with reviewing the utility of propeller guards has concluded that they may pose more safety problems than they solve, and it would undermine the national uniformity so prized in maritime law to allow state-court juries to second-guess that studied determination.

If this Court does reach the preemption issue, it should hold that the Federal Boat Safety Act preempts petitioner's state tort action. As Mercury Marine has explained in its brief, that decision can properly be grounded in any of the preemption doctrines that have grown up around the Supremacy Clause: express, field, or implied preemption. Further, as this Court has observed, the three categories of preemption are not "rigidly distinct." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). Above all, the "ultimate touchstone" of preemption analysis, *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), is congressional intent. *See Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985). To discern that intent, this Court examines both the express language and the "structure and purpose" of the statute at issue. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990); *FMC Corp.* v. *Holliday*, 498 U.S. 52, 56-57 (1990).

This unified theory of preemption is particularly appropriate when examining whether state tort law is preempted under the Federal Boat Safety Act. The matter at stake implicates maritime law, a field of uniquely federal interest from the time of the Founding. Congress similarly confirmed that federal interest in the Boat Safety Act itself, demonstrating a strong interest in maintaining uniform design standards for boats that may be used in navigable waters. Congress made its intent to preserve uniform design standards clear through its express preemptive language, through its delegation of rulemaking authority to experts in the field, and in the exacting provisions of the Act that reflect a careful balancing at the national level of the need for safe boats against the costs of making them safe.

A. The Boat Safety Act Was Intended To Promote Uniform Regulation In This Traditionally Federal Maritime Field.

This Court has recognized that there are some areas of regulation that implicate a "unique[ly] federal concern." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988). Maritime law is one such area. *United States* v. *Locke*, 529 U.S. 89, 99 (2000). The reason: the acknowledged need for uniformity of regulation of maritime vessels operating in the United States' navigable waters. *See id.* at 109. The need for uniform regulation applies regardless of whether the maritime activity being regulated is commercial, *see Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), or primarily recreational, *see Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674-675 (1982) ("The federal interest in protecting maritime commerce * * * can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct") (emphasis in original). *See also Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990) ("[T]he need for uniform rules of maritime conduct and liability is not limited to navigation, but expands at least to any other activities traditionally undertaken by vessels"); *Calhoun* v. *Yamaha Motor Corp.*,

USA, 216 F.3d 338, 350 (3d Cir.) ("Creating a uniform system by which activities and events on the waters of the United States would be adjudicated was such a matter of concern to the Framers that they placed admiralty as among the powers of the newly-created federal government") (citing U.S. Const. art. 1, § 8, cl. 10), *cert. denied*, 531 U.S. 1037 (2000).

The federal government's "uniqu[e] * * * concern" in the maritime area manifests itself in two related ways. First, no presumption of state primacy arises in a preemption case presenting maritime issues. *See Locke*, 529 U.S. at 108. Second, where uniquely federal concerns are implicated, a lower threshold for conflict preemption applies, such that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.' " *Boyle*, 487 U.S. at 507 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As this Court put it in *Boyle*, "the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." 487 U.S. at 507-508. *See also* U.S. Br., *Buckman Co.* v. *Plaintiff's Legal Committee*, No. 98-1768, at 10 ("when state law intrudes on an area of preeminent federal concern, the presumption against preemption disappears, and the danger of a fatal conflict significantly increases").

The federal government's "long history of preemption in maritime safety matters" is reflected in Congress's expressed intent in the Boat Safety Act to create uniform standards of boat and equipment design. S. Rep. No. 92-248, at 20 (1971). In describing the purpose of the Act, the House Report accompanying the bill stated that it was "time that recreational boats be built in accordance with standards prescribed by one Federal agency," and that the bill was intended to "preemp[t] the field on boating standards or regulations." H.R. Rep. No. 92-324, at 2, 11 (1971). The

Senate Report similarly noted that "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. No. 92-248, at 14; *see also id.* at 15 (Act intended to "authoriz[e] the establishment of national construction and performance standards for boats and associated equipment" and "encourag[e] uniformity among boating laws"); *id.* at 17 (Act "intended to ensure that virtually all boats are manufactured in compliance with federal safety standards whether or not they will be operated within the federal maritime jurisdiction"). Just as "Congress intended uniform national standards for design and construction of tankers" in the Ports and Waterways Safety Act, *Ray*, 435 U.S. at 163, it intended through the Boat Safety Act to impose similarly uniform requirements for recreational boat design.

Petitioner's state tort action rests on the allegation that Mercury Marine should have included a piece of equipment on its outboard motor that the federal government expressly declined to require. State tort suits like this one by their nature perpetuate *nonuniform* standards. Juries in different States presented with the same liability issue (*e.g.*, whether and what kind of propeller guards should have been installed) will deliver verdicts that articulate widely different safety and design standards—and all those different standards will apply to national boat manufacturers who sell products in, or whose products are operated in, those different States. *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 871 (2000) ("the rules of law that judges and juries create or apply in [tort] suits may themselves * * * create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts"). The cacophony of equipment and design "standards" created in such tort suits thus conflicts with the uniquely federal interest in uniformity of regulation as a general principle of maritime jurisprudence, and stands as an obstacle to Congress's effort to achieve

uniformity of boat equipment regulation in the Boat Safety Act.

Petitioner argues that Congress's goal was not to foster uniformity of regulation in this federal field, but simply to "improve boat safety," and that allowing tort actions like this one furthers that goal. *See* Pet. Br. 33, 38-39; *see also* ATLA Br. 15-17. That is wrong on two counts. First, the purpose of the Boat Safety Act was not just to "improve boat[] safety"; it was to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public *through compliance with safety standards to be promulgated by the [Coast Guard]*." S. Rep. No. 92-248, at 6 (emphasis added). Second, tort actions claiming a failure to install propeller guards do nothing to promote boat safety. The Propeller Guard Subcommittee concluded—after a year of study and in a recommendation adopted by the Coast Guard—that the risks caused by propeller guards at least counterbalanced their questionable safety benefit. *See* J.A. 39 ("The development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence"). Petitioner's and amicus ATLA's arguments that a de facto propeller guard requirement imposed by a jury *promotes* boat safety ignore the Subcommittee's unrebutted expert conclusion that propeller guards pose at least as many dangers as they might ward off.

B. State Tort Actions Against Boat Manufacturers Conflict With The Express Provisions Of The Boat Safety Act.

Allowing state juries to impose tort liability on manufacturers for purported design flaws conflicts not only with the federal interest in uniform maritime regulation and the congressional purposes behind the Boat Safety Act, but also with the Act's express terms. The Act prohibits the Coast Guard from "compel[ling] substantial alteration of a recreational

vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation." 46 U.S.C. § 4302(c)(3). Indeed, the Coast Guard may not require *any* alterations to existing equipment unless those alterations are necessary to "avoid a substantial risk of personal injury to the public" and "appropriate in relation to the degree of hazard that the compliance will correct." *Id.* Even with prospective changes in safety or equipment standards, the Act requires the Coast Guard to allow a six-month grace period before new regulations become effective, "unless * * * there exists a recreational vessel safety hazard so critical as to require an earlier effective date." *Id.* § 4302(b). The Coast Guard may extend the minimum six-month grace period to two full years, if the regulation "involve[s] major product design, retooling, or major changes in a manufacturing process." *Id.*

Section 4302 of the Boat Safety Act demonstrates that Congress balanced its strong interest in national boat equipment design and safety standards against the recognized need gradually to assimilate standard changes into commerce. *See* S. Rep. No. 92-248, at 18 (noting concern that "the specification of an earlier effective [compliance] date may result in serious dislocation of manufacturing procedures and schedules and [a]n increased cost to the consumer"); *id.* at 19 ("*great caution* [must] be exercised in applying standards to existing boats because of the great burden this can create on both manufacturers and the boating public"). In setting a high threshold for requiring changes to existing stock, Congress ensured that the Coast Guard's regulatory actions would be prospective only, *except* where it could be shown that the immediate safety benefits from requiring insubstantial alterations to existing boats or equipment far outweighed the burdens imposed on manufacturers of retrofitting those products. And Congress ensured that the effect on commerce of even *prospective* design and equipment requirements would be mitigated by granting manufacturers a liberal statu-

tory grace period to bring their products into compliance with the new standards.

Section 4302's firm restrictions on requiring alterations and its generous grace periods establish that Congress was not willing to achieve boat safety at all costs; rather, Congress understood that issues of manufacturing feasibility, financial considerations, and the need to implement change gradually in a national market all necessarily tempered the Act's goals. As this Court has recognized, such restrictive statutory terms may not be disregarded in favor of carrying out the Act's broader purpose; to do so would be to

> ignore[] the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. [*Board of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).]

See also Rodriguez v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law.") (Emphasis in original).

Allowing state-court juries to impose tort liability on manufacturers for failing to install propeller guards would frustrate the careful balance Congress struck in Section 4302 of the Boat Safety Act. A finding of tort liability—and a damage award—amounts to a finding that a manufacturer *should have* installed a guard on a piece of equipment currently in use. *See Geier,* 529 U.S. at 881. Once a jury hands down a liability verdict, manufacturers must either take steps to alter their stock currently in use—by, for instance, conducting a recall or retrofit campaign, *see Powers* v. *Bayliner*

Marine Corp., 83 F.3d 789, 792 (6th Cir.) (explaining the difference between the two actions), *cert. denied*, 519 U.S. 992 (1996)—or risk another adverse judgment in the same or another State for failing to retrofit that equipment. *See Geier*, 529 U.S. at 881 (rule of state tort law establishing duty to install airbags "would have required all manufacturers to have installed airbags" in all cars sold in that State); *id.* at 882 ("this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question") (emphasis in original). The action-forcing nature of a state tort verdict simply does not comport with Congress's express intent that retrofitting boats be required only under carefully limited circumstances.

C. The Coast Guard's Unambiguous And Informed Determination Not To Require Propeller Guards Is Entitled To Preemptive Effect.

1. The intent of Congress to preempt state tort actions imposing new boat design standards can also be seen in its exacting delegation of authority to the Coast Guard and an advisory panel of maritime and boat design experts. *See* S. Rep. 92-248, at 17 (administrative rather than statutory safety standards "take advantage of the expertise and flexibility available in the administrative process"). An expert subcommittee of the National Boat Safety Advisory Board issued a detailed and unanimous recommendation to the Coast Guard that it take no regulatory action to require propeller guards, and the Coast Guard implemented that recommendation. Its informed decision pursuant to congressional mandate should be accorded heavy weight.

Although it involved a different preemptive statute and did not touch on the federal field of maritime law, the Court's recent decision in *Geier* is instructive on this question. This Court held in *Geier* that a state tort action against an automobile manufacturer for failing to install an airbag was impliedly preempted by a safety standard promulgated under the

National Traffic and Motor Vehicle Safety Act of 1996. The 1984 standard at issue in that case, Federal Motor Vehicle Safety Standard (FMVSS) 208, directed automobile manufacturers gradually to phase in passive restraint devices in their vehicles. 49 Fed. Reg. 28962 (July 17, 1984). When the Department of Transportation promulgated FMVSS 208, it noted that "passive restraint systems had their own disadvantages" and that airbags in particular posed "special risks to safety," including the risk of injury to children occupying the front seat of a small car. 529 U.S. at 877 (citing 49 Fed. Reg. 28962, 28992-93 and 65 Fed. Reg. 30680, 30681-82 (May 12, 2000)). The Department also recognized that airbags were " 'significantly more expensive than other passive restraint devices' " such as seatbelts; a mandatory airbag requirement could potentially have cost manufacturers and consumers upwards of a billion dollars. 529 U.S. at 878 (citing 49 Fed. Reg. 28990 (1984)). The Department accordingly established a standard pursuant to which manufacturers could choose among various forms of passive restraint devices (*e.g.*, automatic seatbelts), and could bring their fleets into compliance with the flexible standard gradually over a period of time. 529 U.S. at 881.[2]

This Court concluded that FMVSS 208 preempted a state tort action that "depend[ed] upon [a] claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord." *Id.* That "state law—*i.e.*, a rule of state tort law imposing such a duty—by its terms would have required manufacturers of *all* similar cars to install airbags rather than other passive restraint systems" in their vehicles,

[2] In *Geier*, the Department of Transportation had approved airbags as one form of passive restraint device, to be introduced gradually over time. In this case, in contrast, the Coast Guard adopted the recommendation of its expert advisory committee and concluded that, because propeller guards did not satisfy the Boat Safety Act's stringent statutory standards, it would *not* require manufacturers to install such devices, on any boat, at any pace.

in tension with the Department's goal of achieving a mix of devices, and would have required the *entire* portion of the fleet sold in the State to carry airbags, in conflict with the Department's intent gradually to phase in passive restraint requirements in vehicle fleets. *Id.* (emphasis added). While the conflict with the agency's objectives posed by the state tort action did not arise from "a formal agency statement of preemptive intent," this Court found that to be of little moment in the conflict preemption inquiry: "conflict preemption * * * turns on the identification of 'actual conflict,' and not on an express statement of preemptive intent." *Id.* at 884 (quoting *English*, 496 U.S. at 90). "[This] Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." 529 U.S. at 884.

In this case, after receiving petitions to adopt a propeller guard requirement, *see* J.A. 18, the United States Coast Guard, acting pursuant to its statutory mandate under the Boat Safety Act, issued a formal and detailed request that the National Boating Safety Advisory Council investigate the feasibility of mechanical guards to protect against propeller strikes. *See id.* at 42-44. The Advisory Council—composed of twenty-one members appointed by the Secretary of Transportation and with particular "expertise, knowledge, and experience in recreational boating safety," 46 U.S.C. § 13110—appointed a Subcommittee to review and analyze "the available data on the prevention of propeller-strike accidents," examine the "various methods of shrouding propellers to prevent contact with [a] person in the water," and "[a]ssess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public." J.A. 43.

The Subcommittee conducted a year-long study of propeller guards, their potential benefits, and their attendant haz-

ards. It held public hearings, took documentary and testimonial evidence, and its members test-drove recreational boats with various forms of propeller guards attached. The Subcommittee concluded that propeller guards "can * * * be counter-productive and can create new hazards of equal or greater consequence," including *increasing* the risk of striking a body in the water, *id.* at 39, and *increasing* the likelihood of grave injury to a person struck by the blunt impact of the propeller guard or caught between the guard and the propeller. *Id.* at 34, 36. The Subcommittee also found that it had been "clearly demonstrated" that certain propeller guards caused "serious safety and control problems," posing real dangers for all but the most expert boat operators. *Id.* at 31; *see id.* at 31-35 (enumerating potential safety hazards of propeller guards). And the Subcommittee noted that retrofitting all existing boats with propeller guards would require a "vast number of guard models at prohibitive cost" *Id.* at 38. The Subcommittee unanimously recommended to the Coast Guard that it "take no regulatory action to require propeller guards." *Id.* at 76.

The Coast Guard accepted the Subcommittee's recommendation and confirmed that it would "take no regulatory action to require propeller guards." *Id.* at 80. In his letter adopting the Subcommittee's recommendations, the Chief of the Coast Guard's Office of Navigation Safety and Waterway Services referred to the Boat Safety Act's statutory standards for requiring design changes to existing boats, noting that the statute's "regulatory process is very structured and stringent regarding justification," and that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.* The letter also noted the "many questions about whether a universally acceptable propeller guard is available or technically feasible." *Id.* Finally, echoing the statute's recognition of the burdens on commerce and consumers of requiring massive retrofits, the Coast Guard letter noted that "the question of retrofitting

millions of boats would certainly be a major economic consideration." *Id.*[3]

Just as in *Geier*, a state tort action resting on a claim that a manufacturer had a *duty* to install propeller guards conflicts with the Coast Guard's considered decision to "take no regulatory action to require propeller guards." Petitioner's tort action is expressly predicated on the notion that propeller guards should have been installed on Mercury Marine's outboard motor—and by extension, all comparable Mercury Marine outboard motors, and even further, all other manufacturers' comparable outboard motors. *See Geier*, 529 U.S. at 881 (a finding of a state tort duty "by its terms would have required manufacturers of all similar cars to install airbags"). That requirement conflicts with the Coast Guard's opposite conclusion: that it would not require manufacturers to install propeller guards at all. *See NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (" 'For a state to impinge on the area of labor combat *designed to be free* is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' ") (quoting *Garner* v. *Teamsters Chauffeurs & Helpers Local No. 776*, 346 U.S. 485, 500 (1953)) (emphasis added).

The fact that the Coast Guard did not expressly state its intent to preempt state tort actions based on an alleged negligent failure to provide propeller guards is not determinative,

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[3] The Solicitor General characterizes the Coast Guard letter as merely suggesting that "at that time, the affirmative imposition of a federal propeller guard requirement *could not be justified* under the relevant statutory criteria." U.S. Br. 27 (emphasis added). Another way of saying this might be that a standard *requiring* propeller guards—achieved through a tort action, for example—would conflict with the Act's statutory criteria for such design standards. *See supra* at 8-10. The "relevant statutory criteria" under federal law for the imposition of safety standards are surely not irrelevant to the preemption analysis.

as this Court recognized in *Geier*: "actual conflict," not the agency's express intent to preempt, is what counts. 529 U.S. at 884. *See* U.S. Br., *Geier* v. *American Honda Motor Co.*, No. 98-1811, at 27 n.24 ("Conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. Here, because conflict preemption is at issue, *neither* a statement of preemptive intent *nor* notice and comment on preemption was required.") (emphases added and citation omitted).[4]

2. Petitioner and the Solicitor General argue that the agency's "considered decision to forego federal regulation," U.S. Br. 18, so akin to the careful balancing act performed by the agency in *Geier*, nonetheless is not entitled to preemptive effect. The Solicitor General distinguishes *Geier* on grounds that that case involved "an existing federal safety standard," while this case involves what the Solicitor General dubs a "failure to regulate." *Id.* at 19. But an agency's considered,

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[4] Although it did not expressly articulate preemptive intent at the time it adopted the Subcommittee's recommendation, the Coast Guard later acknowledged the preemptive effect of its decision not to regulate. In a notice inviting comment on requiring rental houseboats to carry propeller guards, the Coast Guard noted that "States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction." 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996).

Because the Coast Guard has previously stated that its decision not to regulate propeller guards preempts States from regulating that area of design, the Solicitor General's arguments against preemption should be accorded far less weight. *Compare Geier*, 529 U.S. at 883 (Court would place "some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion" that state tort suits would conflict with those objectives, particularly where agency had maintained its interpretation "consistently over time").

intentional decision *not* to regulate can have preemptive effect, as this Court repeatedly has recognized.

In *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court observed that a "federal decision to forego regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 384 (emphases in original) (citing *NLRB* v. *Nash-Finch Co.*, 404 U.S. at 144, and *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 155 (1982)). *Accord Ray*, 435 U.S. at 178; *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). As this Court explained in *Ray*, if a federal agency's " 'failure * * * affirmatively to exercise [its] full authority *takes on the character of a ruling* that no such regulation is appropriate or approved pursuant to the policy of the statute,' " States may not implement laws regulating in the same area. 435 U.S. at 178 (emphasis added) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

When it adopted the unanimous and detailed recommendation of the Propeller Guard Subcommittee, the Coast Guard made the considered decision that the policy of the Boat Safety Act would not be served by regulating propeller guards. That "authoritative federal determination," *Arkansas Elec.*, 461 U.S. at 384, has preemptive effect.

Petitioner and the Solicitor General cite this Court's decision in *Puerto Rico Department of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U.S. 495 (1988), where the Court explained that "deliberate federal inaction" does not always have preemptive effect:

> There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-

> emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action. [*Id.* at 503 (emphasis in original).]

See Pet. Br. 42-43; U.S. Br. 23.

The *Puerto Rico* Court, however, was asked to find what might be described as "lingering preemption:" the federal statute on which petitioners' preemption argument was based had conferred authority on the federal government to regulate the allocation and price of petroleum products, but had *expired* nearly five years before a State sought to regulate in the same area. *Id.* at 497-498. The Court was thus asked to find that federal preemption existed "despite, not only the absence of a statutory provision specifically announcing it, but the absence of *any* extant federal regulatory program with which the state regulation might conflict and which might therefore be thought to imply preemption." *Id.* at 500 (emphasis added). The Court concluded that where Congress had "withdrawn from all substantial involvement" in the field, and where there was no other "extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field" other than assorted pieces of legislative history ungrounded in any federal statute, it would not find a purportedly conflicting state law preempted. *Id.* at 504.

This case easily clears the threshold set in *Puerto Rico*. The Coast Guard's decision not to regulate was made in the traditionally federally-regulated field of maritime law, and under a fully operational statute that, like other maritime statutes, identifies uniformity of regulation as one of its primary objectives. And it was irrefutably the Coast Guard's intent, when it issued its letter adopting the investigatory subcommittee's recommendation to "take no regulatory action," to leave the issue of propeller guards—that small portion of the regulated field—without federal controls. The Coast Guard's letter, in fact, adopted in full the six-point

alternative regulatory strategy proposed by its expert advisory committee—a scheme emphasizing, among other things, consumer education and increased enforcement of safe boating practices. *See* J.A. 40-41 (subcommittee recommendations); *id.* at 80 (Coast Guard letter) ("All of the report's recommendations are accepted" [illegible] "will be implemented").[5]

That is a far cry from the sheer lack of action (ungrounded even in an extant federal statute) that failed to sway the Court in *Puerto Rico*. Indeed, the same principle this Court articulated in *Boyle* applies here as well: where an agency is regulating in a uniquely federal field, its deliberate conclusion that it will not impose requirements on a portion of that field has preemptive force—even if, in a field traditionally occupied by the States, more might be required from the agency to demonstrate sufficient intent to preempt.

Petitioner suggests that if preemption is found here, then "*any* federal decision not to regulate" may be grounds for preemption. Pet. Br. 48 (emphasis in original). That is not so, for the same reasons this Court explained in *Puerto Rico*. 485 U.S. at 503. Courts have also consistently identified a difference between the Coast Guard's well-documented decision not to regulate in this case and the mere absence of regulation in other circumstances. In *Stanley* v. *Bertram-*

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[5] The Coast Guard's approval of an alternative regulatory approach to requiring propeller guards is similar to the approach the agency took—and which was found to have preemptive effect—in *Ray*, 435 U.S. at 174. There, rather than issuing a regulation imposing size limits on tanker ships traversing Puget Sound—as it had authority to do—the Coast Guard instead implemented a navigation rule limiting passage in the sound to one tanker at a time if the ships exceeded a specified weight. *Id.* This Court concluded that a state law prohibiting tankers of a certain size from passing through the strait was preempted by the Coast Guard's alternative regulatory scheme. *Id.* at 175. So too here: the Coast Guard's decision not to require propeller guards, and its implementation of an alternative safety scheme, has preemptive force.

Trojan Inc., 855 F. Supp. 657 (S.D.N.Y. 1994), for example, the district court allowed a tort action for a negligently designed boat hatch to proceed. The court observed that the "critical difference" distinguishing that case from the propeller guard cases "is that propeller guards specifically were considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it." *Id.* at 658. Similarly, in *LaPlante* v. *Wellcraft Marine Corp.*, 114 Cal. Rptr. 2d 196, 205 (Cal. Ct. App. 2001), *review denied* (2002), the court of appeals allowed a state tort action based on failure to provide handholds, contrasting the scant evidence of the Coast Guard's consideration of that issue with the "thorough record that a conscious and intentional determination was made by the Coast Guard that boats should not be required to have propeller guards." *See also Becker* v. *U.S. Marine Co.*, 943 P.2d 700, 705 (Wash. Ct. App. 1997) (propeller guard preemption cases "represent a special situation where there is proof of the Coast Guard's considered decision not to regulate;" in contrast, Coast Guard has not "formally considered, evaluated, and rejected regulation of bow seating design"), *review denied*, 958 P.2d 313 (Wash. 1998).

Petitioner also argues that this case is "markedly similar" to *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), where this Court concluded that a state tort suit was not preempted by the federal highway safety regulatory scheme. Pet. Br. 45. The statutory preemption provision at issue in *Freightliner* provided that " '[w]henever a Federal motor vehicle safety standard * * * *is in effect*,' " all state safety standards not identical to the federal standard were preempted. *Id.* at 284 (quoting 15 U.S.C. § 1392(d)) (emphasis added). The National Highway Traffic Safety Administration promulgated a vehicular safety standard that required trucks and trailers to be equipped with antilock braking systems (ABS). A court of appeals vacated the standard, finding that the agency had not supported it with sufficient evidence. This Court concluded that state tort suits based on tractor-trailers' failure to

employ ABS were not expressly preempted, because no applicable federal safety standards were then "in effect." 514 U.S. at 286. Nor, it concluded, were such suits preempted because of a conflict between the agency's intent not to regulate and state law: the "lack of a federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes," but from a court's directive. *Id.* at 286.

This case is completely different. Here the Coast Guard *did* make "an affirmative decision * * * to refrain" from regulating propeller guards, giving rise to a conflict between its stated intent not to impose propeller guard standards and state tort suits seeking to impose those same standards. *Freightliner*, 514 U.S. at 286. In *Freightliner*, the federal agency was *trying* to require just what the state tort suits also sought: that tractor-trailers have ABS brakes.

Petitioner's amicus ATLA describes this case as "analogous" to the preemption issue this Court recently addressed in *Chao* v. *Mallard Bay Drilling Co.*, 122 S. Ct. 738 (2002). *See* ATLA Br. 28-29. It is not. The statute at issue in *Chao*, part of the Occupational Safety and Health Act, required employers to comply with safety standards promulgated by the Secretary of Labor, except that " '[n]othing in th[e Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.' " 122 S. Ct. at 742 (quoting 29 U.S.C. § 653(b)(1)) (emphasis added). This Court concluded that the use of the word "exercise" in that statutory provision demonstrated that "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction;" rather, the other agency must have issued regulations with respect to the same working conditions. 122 S. Ct. at 743. Because the Coast Guard in *Chao* had not issued regulations pertaining to the working conditions at

issue in that case, this Court found OSHA's jurisdiction not preempted. *Id.*

From this statute-specific holding, ATLA extracts the general notion that when the Coast Guard "fail[s] to exercise its regulatory authority," its failure to act cannot have preemptive effect. ATLA Br. 28. But while the same agency was involved in that case and this one, the similarities stop there. The statutory schemes operating in each case are completely different: most notably, the Coast Guard has sole, not contingent, federal jurisdiction over boat safety standards. Further, as even the Solicitor General recognizes, under the Boat Safety Act state statutes or regulations imposing boat safety requirements are preempted even when the Coast Guard has yet to regulate affirmatively in the area. *See* U.S. Br. at 11-12 ("unless and until the agency has promulgated a safety standard dealing with a particular matter," the Boat Safety Act "categorically precludes the States from adopting such a requirement by statute or regulation"). And the Coast Guard did not in any event "fail to exercise its regulatory authority;" it affirmatively declared that it would not require propeller guards. *See* U.S. Br., *Chao* v. *Mallard Bay Drilling Co.*, No. 00-927, at 18 (agency may "exercise" regulatory authority either by "promulgating standards or regulations" or by "articulating a policy that existing regulation is sufficient and that no additional requirements are warranted").

The Petitioner and the Solicitor General both suggest that the Coast Guard's conclusion that it would "take no regulatory action" to require propeller guards was not formal enough because interested parties were not provided an opportunity to challenge the Coast Guard's decision. *See* Pet. Br. 36; *cf. id.* at 48; U.S. Br. 25-26. But that argument is neither correct on the law nor accurate on the facts. This Court has never suggested that an affirmative decision not to regulate must be subject to notice-and-comment rulemaking. *See Geier*, 529 U.S. at 885; U.S. Br. in *Geier*, No. 98-1811, at 27 n.24 ("because conflict preemption is at issue, *neither* a

statement of preemptive intent *nor* notice and comment on preemption was required").[6] In addition, the Coast Guard took up the issue of propeller guards after petitions were filed requesting that the Coast Guard require such devices. *See, e.g.*, J.A. 18; 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). When the Coast Guard adopted the Subcommittee's recommendations and concluded that it would "take no regulatory action" to require propeller guards, its conclusion amounted to the denial of the petitions for rulemaking. That was an appealable decision. *See Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002); *American Horse Protection Ass'n* v. *Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (denial of petition for rulemaking is final agency action reviewable by an appellate court).

D. Petitioner's "Federalism" Concerns Are Misplaced.

As did petitioners and their amici in *Geier*, petitioner and his amici cast their argument as an appeal to the concept of "federalism." *See* Pet. Br. 2, 47; ATLA Br. 12; *see also* Pet. Br., *Geier*, No. 98-1811, at 17 ("This case is about federalism and the separation of powers."); ATLA Br., *Geier*, No. 98-1811, at 27-28 ("due regard for federalism counsels against

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[6] Far less formal proceedings than this detailed inquiry have led to a finding of preemption. In *American Public Health Association* v. *Butz*, 511 F.2d 331, 333-334 (D.C. Cir. 1974), for example, the court of appeals described the process by which the Department of Agriculture concluded that it would not regulate inspection for salmonella and other bacterial agents: the Department in private letters declined petitioners' request that it regulate such agents, and reiterated its position in a private meeting with petitioners. The court in *Boulahanis* v. *Prevo's Family Market, Inc.*, 583 N.W.2d 509, 512 (Mich. Ct. App. 1998), *cert. denied*, 520 U.S. 1203 (2000), concluded that those actions constituted an "intentional decision" *not* to require inspection for E. coli bacteria under the Federal Meat Inspection Act, and that the plaintiffs' tort action for failure to inspect meat for E. coli was preempted.

eliminating tort actions on the basis of obstacle preemption"). According to petitioner, States should be "free to do as they choose" in the area of boat safety if the Coast Guard has failed to issue controlling regulations on point, Pet. Br. 34, and any contrary holding would "seriously encroach on 'the constitutional role of the States as sovereign entities' " and "strip[] [them] of their power to protect and compensate their citizens." *Id.* at 47, 49.

Petitioner forgets the maritime field in which this case arises. In this field, the federal government's interest holds sway over notions of state sovereignty; preserving the primacy of the government's interest in uniform boat safety standards does nothing to "encroach" on States' traditional sovereignty rights. The Coast Guard and its expert advisory committee concluded that propeller guards could cause far more problems than they solved and were prohibitively expensive. Yet according to petitioner, lay juries in every State should be able to reexamine the same issue and force manufacturers to implement new-fangled, controversial, and potentially dangerous equipment changes that the expert agency expressly concluded were *not* required. That does not comport with Congress's consistent intent to regulate maritime issues according to central, unified standards, articulated and implemented by the federal government.

Tort judgments, moreover, affect manufacturers far beyond the jurisdiction in which they arise; such verdicts drive manufacturing changes across the national market.[7] *Cf.*

[7] In this case in particular, a tort liability verdict would present manufacturers with two particularly undesirable options. They could opt to tailor their product specifications to the standard set by Illinois—lest they face certain liability in Illinois or States that follow its lead. *See Geier*, 529 U.S. at 881. But if they include propeller guards on their products and those guards cause harm, they will face liability for negligent design of those motors—and the Propeller Guard Subcommittee's thorough report detailing the dangers of such products will be submitted as Exhibit A in that proceeding.

ATLA Br. 3 (tort suits that "requir[e] manufacturers to bear the cost of harms caused by unreasonably dangerous products * * * leav[e] decisions regarding safety to private parties responding to market forces"); *id.* at 15-16 (tort suits "provide market incentives for manufacturers to invest in safety"). State juries that articulate stringent design standards essentially dictate standards across the country; manufacturers may not risk designing products to anything other than that highest common denominator. That is not "federalism" at work; it is an affront to maritime law and to free commerce. Congress expressly stated that the field of boat equipment design should be governed by uniform standards; it preempted the field of boat safety design; it established an intricate and specialized network of experts to set those standards; and it did all that in the indisputably federal maritime field. The Coast Guard's decision not to regulate propeller guards, in light of the statute, Congress's purpose, and the goals of federal maritime law, preempts this tort case.

CONCLUSION

For the foregoing reasons, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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